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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONSE TO GTE'S CONDITIONAL CROSS-PETITION

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QUESTIONS RESTATED

1. Whether the Federal Communications Commission ("FCC") reasonably construed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, in concluding that "any requesting telecommunications carrier" may obtain access to the incumbent local exchange carriers' ("LECs' ") "unbundled network elements" pursuant to Section 251(c)(3), not merely requesting telecommunications carriers that also have network facilities of their own?

2. Whether the FCC reasonably applied the Act in determining, on multiple and independent grounds, that incumbent LECs must provide new entrants with "nondiscriminatory access" to the "operations support systems" that they use to control the ordering, provision, repair, and billing of the telecommunications services that those new entrants will offer through the LECs' "network elements" under Section 251(c)(3) and through resale of the LECs' services under Section 251(c)(4)?

3. Whether the FCC reasonably applied the Act in determining that "operator service and directory assistance facilities" are "network elements?"

4. Whether the FCC reasonably construed Section 251(d)(2) of the Act, which sets forth some of the factors that the FCC must "consider" in determining what network elements must be made available, in concluding that the theoretical possibility that some facilities could be duplicated at a higher cost from another source would not justify foreclosing access to those facilities as LEC network elements?

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AT&T Corp., ACC Corp., America's Carriers Telecommunications Association, Competitive Telecommunications Association, Excel Telecommunications, Inc., General Communications, Inc., Sprint Corporation, Telecommunications Resellers Association, and WorldCom, Inc., petitioners in this proceeding, respectfully submit this response to the cross-petition filed by GTE Midwest Incorporated ("GTE").

GTE's cross-petition further confirms the critical importance that all parties attach to the Eighth Circuit's invalidation of Rule 51.315(b). Indeed, like the similar cross-petition filed by the Regional Bell Companies,[1]

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[1] *See* Conditional Cross-Petition of Regional Bell Companies for a Writ of Certiorari, *Ameritech Corporation, et al.* v. *Federal Com-*

GTE's cross-petition focuses exclusively on that question. For the same reasons previously advanced in its Brief in Opposition,[2] GTE again urges the Court to leave that holding unreviewed. However, GTE now also claims that, if the Court nonetheless grants certiorari on that question, it should also review the Eighth Circuit's decision to affirm three other sets of FCC rules and holdings of the *First Report and Order*: (1) 47 C.F.R. § 51.307(a), which allows any new entrant to obtain from incumbent local exchange carriers ("LECs") unbundled network elements, regardless of whether the new entrant has any facilities of its own; (2) 47 C.F.R. §§ 51.319(f), 51.319(g), which classify operations support systems, and operator services and directory assistance facilities, as "network elements" to which new entrants must be afforded nondiscriminatory access, and (3) paragraphs 283 and 287 of the *First Report and Order*, which provide that the theoretical availability of a network facility from a source other than the LEC at a higher cost to the new entrant does not foreclose access to that facility as a LEC network element.

The first of these claims is identical to the first claim raised in the cross-petition of the Regional Bell Companies.[3] As explained in our response to that cross-petition, that claim is insubstantial on the merits. It has no textual or structural basis in the Act, and its adoption would defeat the Act's pro-competitive purposes. However, the Eighth Circuit treated that issue as to some degree related to its separate holding that "unbundled" means "separated" and that Rule 51.315(b) is therefore unlawful. For that reason, when that claim was raised by the

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munications Commission, et al., No. 97-1075 (Dec. 24, 1997) ("Bell Companies Cross-Pet.").

[2] *See* GTE's Brief in Opposition, *AT&T Corp., et al.* v. *Iowa Utilities Board et al.*, and related petitions (Nos. 97-826, 97-829, 97-830, and 97-831) (filed Dec. 18, 1997).

[3] *See* Bell Companies Cross-Pet. 14-22.

Regional Bell Companies, we stated that we do not oppose certiorari if the Court also grants certiorari on Rule 51.315(b).[4] We likewise do not oppose GTE's reiteration of that claim.

However, there is no conceivable basis for granting certiorari on GTE's other two questions, and GTE's descriptions of those issues misstate or omit crucial facts. For example, GTE does not even reveal that the FCC's decision requiring incumbent LECs to provide nondiscriminatory access to operations support systems, in addition to relying on the grounds described in GTE's cross-petition, also rested on an additional independent ground that no party challenged before the Eighth Circuit and that GTE does not challenge here.

The only possible reason for GTE's inclusion of these claims in its cross-petition is to attempt to discourage a grant of certiorari on Rule 51.315(b) by suggesting that the Court could not grant certiorari on that question without also having to resolve numerous uncertworthy claims along with it. But there would be no need to review those claims under any circumstance. GTE concedes that those claims are not independently certworthy by conditioning its cross-petition on a separate grant of certiorari concerning Rule 51.315(b). Those claims therefore depend upon a showing that they are materially related either to Rule 51.315(b) or to the Eighth Circuit's basis for invalidating Rule 51.315(b), and GTE makes no such showing. To the contrary, these various issues were all resolved on the basis of the Eighth Circuit's construction of different statutory provisions. Indeed, the only connection among GTE's disparate claims is that each represents a distinct legal theory by which GTE seeks to force new entrants

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[4] *See* Response of AT&T Corp., et al. to Conditional Cross Petition of Regional Bell Companies, *Ameritech Corporation, et al.* v. *Federal Communications Commission, et al.*, No. 97-1075 (Dec. 30, 1997) at 19-20.

that seek access to LEC network elements to "shoulder . . . additional costs" and thus be unable to compete. GTE Cross-Pet. 19.

STATEMENT OF THE CASE

1. "Operations support systems" are the databases and associated hardware and software that incumbent LECs use to input orders from customers, to assign telephone numbers, to track the facilities that provide customers with service, to test and coordinate maintenance of those facilities, and to convert the recorded customer usage information into bills. They are an essential part of providing telecommunications services, and will be used by incumbent LECs in filling orders placed by new entrants for network elements and services to be resold even under GTE's view of the law.

When a customer moves into a new home and calls up the incumbent LEC to order phone service, the sales representative that answers the call can access the operations support systems immediately to obtain the necessary information, and to program the network to provide service, through a computer terminal on his or her desk. The sales representative will use that terminal to, among other things, (1) verify the customer's location on the telephone network, (2) assign the customer a telephone number, (3) assign the particular facilities that will be used to provide service to that customer, and (4) program the switch in the telephone network to provide that customer with whatever special features, such as Call Waiting, the customer requests. If the customer later calls to complain of a service outage or similar problem, a different representative can access similar systems to conduct a mechanical test of the customer's line, and, if necessary, to program into the maintenance schedule a visit to the customer's home. Many of these systems are thus directly connected to the facilities that route calls within the network, and allow the LEC

representative to program or test those facilities with a few keystrokes. These LEC personnel can thereby confirm that service has been turned on, give the new customer a telephone number, or tell the customer when a repair visit will be made, in the same telephone call in which the customer first contacts them.

When a new entrant is providing a customer with service through network elements under Section 251(c)(3) or resale under Section 251(c)(4), the incumbent LEC still controls all access to the underlying facilities. Thus, a competitor cannot advise the customer of his or her new telephone number, commit to a schedule for providing or repairing a service, or even know which specific facilities are serving that customer until it first accesses the LEC system and obtains the necessary information. Nor can the customer receive service unless and until someone inputs the customer's order into the LEC's systems.

Before the FCC, the LECs did not deny that competitors must have access to this information and the ability to send orders and other instructions to the LEC. But they contended that they should be able to preclude competitors from connecting to the LEC systems electronically, as the LECs themselves do, and should be free to force competitors to use far slower and more error-prone methods of transmission, such as faxes, mail, and hand-deliveries—at which point the LECs themselves, at whatever schedule they chose, would key in the orders and requests for information to their systems. The FCC rejected this claim. It held that LECs must give competitors "non-discriminatory" access to the critical information in these systems. If LEC sales representatives can access these systems electronically and provide immediate information to customers during the initial customer contact, competitors must have the same electronic access so that their sales representatives can provide customers the same

response times. See AT&T Resp. to GTE Cross-Pet. App. 7a-8a.[5]

If, by contrast, customers had to wait longer when dealing with competitive carriers than with LECs—hours or days as opposed to minutes—the LECs would have an insurmountable competitive advantage. The FCC thus concluded that the LECs' control over the essential ordering, provisioning, and maintenance systems is as significant a "barrier to entry" as their control over the remainder of their networks (*id.* at 2a); that nondiscriminatory access to these systems is "vital to creating opportunities for meaningful competition" (*id.* at 3a-4a); and that without such access "competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing" (*id.*).

The FCC found that nondiscriminatory access to operations support systems was required on three independent statutory grounds: (1) that the systems are within the definition of "network element" because they are "databases" or "facilit[ies] . . . used in the provision of a telecommunications service" (see § 153(29)) (AT&T Resp. to GTE Cross-Pet. App. 1a); (2) that the systems are within the definition of "network element" because the information they contain is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" (*id.*); and (3) that nondiscriminatory access to these systems is necessary to the statutory requirement that LECs provide nondiscriminatory access to *other* network elements or to services for resale. *Id.* at 2a-3a.

Addressing a separate issue, the FCC found that "operator service[s] and directory assistance facilities" are

[5] In the appendix to its cross-petition, GTE reproduces only a portion of the FCC's discussion of operations support systems. The full discussion is included as an appendix to this response, and is cited as AT&T's Resp. to GTE Cross-Pet. App. 2a.

network elements. Pet. App. 301a.[6] Those are the facilities that route calls and provide customer assistance when customers dial numbers such as "0" or "411." Many of those responses are handled purely mechanically (such as the routing and billing of calling card calls), while others involve the intervention of live operators to whom these facilities route the calls.

The court of appeals affirmed both of these conclusions. With respect to the FCC's conclusion that incumbent LECs must provide nondiscriminatory access to operations support systems, the court of appeals held that each of the first two of the FCC's grounds were independently sufficient to support that conclusion, and did not address the third ground. Pet. App. 41a-44a. With respect to the FCC's conclusion that operator services and directory assistance facilities are network elements, the court of appeals agreed on the ground that they are "features, functions, or capabilities that are provided by facilities or equipment that are used in the provision of telecommunications services." Pet. App. 44a.

2. GTE's third question relates to the FCC's application of Section 251(d)(2). That section lists two factors that "[i]n determining what network elements should be made available for purposes of [Section 251(c)(3)], the Commission shall consider, at a minimum." AT&T Resp. to GTE Cross-Pet. App. 1a. Specifically, Section 251(d)(2) directs the FCC to consider, if the element is "proprietary," whether access is "necessary," and if the element is not proprietary, whether the failure to provide access would "impair" a new entrant's ability to provide "the services that it seeks to offer." Pet. App. 102a.

In the portion of the *First Report and Order* relevant to GTE's cross-petition, the FCC rejected the incumbent LECs' contention that Section 251(d)(2) should be inter-

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[6] Citations to "Pet. App." are to the appendix filed with our petition for certiorari and used by all petitioners.

preted to establish that "if a requesting carrier could obtain an element from a source other than the incumbent, then the incumbent need not provide the element." GTE Cross-Pet. App. 2a. The FCC found that this interpretation would "nullify" the obligation to provide access to network elements "because, in theory, any new entrant could provide all of the elements in the incumbents' networks." However, "Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent's network could delay entry, and could be inefficient and unnecessary." *Id.* The court of appeals affirmed the FCC's conclusion on the same basis. Pet. App. 47a-48a.

ARGUMENT

GTE's cross-petition makes clear that it recognizes that review of the Eighth Circuit's holding on Rule 51.315(b) will be the most important factor determining whether rapid and broad-based competition to its monopolies ever develops. That is manifestly why GTE and the Regional Bell Companies have sought in their cross-petitions to load down that holding with other, unrelated issues in order to discourage certiorari. Indeed, despite their initial efforts to portray Rule 51.315(b) as an unimportant "second-level" issue, see Regional Bell Companies Opp. 2, the incumbent LECs cannot disguise that their priority is to see that any grant of certiorari in this case is limited to the jurisdictional question.[7]

However, the vital competitive significance of the Eighth Circuit's invalidation of Rule 51.315(b) is pre-

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[7] *See* GTE Cross-Pet. 15 n.6 ("If . . . the Court were to grant review on the jurisdictional question *without granting review of Question 2*, there would be no need for the Court to review the questions presented by this conditional cross-petition") (emphasis in original); Regional Bell Cos. Opp. 21 ("However the Court disposes of the jurisdictional issue, these unrelated tag-along issues plainly do not merit . . . review").

cisely why review is urgently needed. GTE denies our observation that it "do[es] not dispute" that the Eighth Circuit has crippled network elements as an entry vehicle, GTE Cross-Pet. 17-18 n.7, but even its denial does not actually dispute that fact. GTE states only that "[n]o new entrant may be denied some or all of the needed facilities under the Court of Appeals' ruling." *Id.* That carefully worded response does not suggest that broad-based competition can develop once GTE and other incumbent LECs rip apart combinations of those facilities before providing them to new entrants, as it plainly cannot.

Indeed, GTE justifies the Eighth Circuit's holding on Rule 51.315(b) on that very ground—that the holding will impede competition through network elements. GTE states that it is necessary to impose additional costs on new entrants seeking to compete through network elements in order to ensure that new entrants bear some costs similar to what GTE claims are its costs of subsidizing "universal service." GTE Cross-Pet. 19-20. That is the sole linkage GTE draws between the disparate issues it raises in its cross-petition. Each, in GTE's view, is simply a method of forcing new entrants to "shoulder . . . additional costs" (GTE Cross-Pet. 19-20), and GTE professes indifference as to which extrastatutory technique is employed to accomplish that objective (*id.* at 13-15).

This argument is as legally unfounded as it is arbitrary. The alleged concern about universal service is a sham. As we have elsewhere explained, Section 254 invalidates the implicit system of universal service subsidies that GTE here invokes, and establishes new mechanisms that will finance universal service through an explicit and separate fund to which both incumbents LECs and new entrants purchasing network elements will contribute on a competitively neutral basis. See AT&T Resp. to Regional Bell Cos. Cross-Pet. 13-16. Moreover, as GTE

concedes (*id.* at 19-20), none of the legal theories it would employ to increase its rivals' costs would logically produce an increase in any way tailored to its alleged concern. The costs of reassembling disassembled elements and of lost customer goodwill as a result of service outages, or of customers lost because new entrants were denied electronic access to the LECs' operations support systems, have nothing to do with any costs of universal service.

As the Eighth Circuit recognized, Section 254 ensures that universal service will be protected while the incumbent LECs' "supracompetitive prices" are driven down through competition. See Pet. App. 57a n.34. Contrary to GTE's claims, the Eighth Circuit thus did not regard the various holdings discussed in GTE's cross-petition as "inextricably interrelated" (GTE Cross-Pet. 2) under GTE's universal service theory. Instead, it rejected that lawless theory and construed three separate provisions of the Act to resolve each of those issues on the basis of specific statutory language. It invalidated Rule 51.315(b) because it mistakenly assumed that "unbundled" in Section 251(c)(3) means "separated"; it upheld the FCC's classification of operations support systems, and operator services and directory assistance facilities, as network elements because those facilities are plainly encompassed by the statutory definition of "network element" in Section 153(29); and it upheld the FCC's interpretation of the factors in Section 251(d)(2). None of those issues are materially interrelated, much less "inextricably" so.[8]

1. *Operations Support Systems.* GTE does not even mention, much less refute, the third independent ground on which the FCC relied in holding that incumbent LECs

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[8] By contrast, as previously noted, the Eighth Circuit did treat the first question in GTE's cross-petition as related in one sense to the invalidation of Rule 51.315(b), and thus we do not oppose certiorari on that issue if certiorari is granted with respect to Rule 51.315(b).

must provide new entrants with nondiscriminatory access to operations support systems. The FCC found that whether or not operations support systems are classified as a "network element," LECs are required to give new entrants the same quality access to such systems as the LECs enjoy themselves. It held that such access was necessary in order to satisfy Section 251(c)(3)'s requirement of "nondiscriminatory" access to the six *other* network elements and Section 251(c)(4)'s requirement that there be no "discriminatory" conditions on resale. See AT&T Resp. to GTE Cross-Pet. App. 2a-3a. The FCC has held, in a rule no party has ever challenged, that "nondiscrimination" requires that the quality of access that the incumbent LEC provides to new entrants be at least equal to the quality of access the LEC provides to itself. Pet. App. 292a. If it takes longer for a LEC to supply access to a network element or a service for resale, or to repair that element or service, when it is supplied on behalf of a new entrant's customers than when it is supplied on behalf of its own customers—as it will if the LEC does not provide nondiscriminatory access to its operations support systems—then the LEC has not complied with the nondiscrimination requirement *for that element or service*.

That independent ground alone renders this issue uncertworthy, for the obligations on incumbent LECs would be the same even if GTE were correct that operations support systems are not themselves "network elements." But GTE is not correct on that point. Section 153(29) defines "network element" as:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29). As the Eighth Circuit found, operations support systems are "network elements" under both the first and the second sentence of Section 153(29): they are "a facility or equipment used in the provision of a telecommunications service," and they are "databases," "information sufficient for billing and collection," and "information . . . used in the . . . provision of a telecommunications service." Pet. App. 42a-43a.

GTE nonetheless contends that "network elements" are statutorily limited to "part[s] of the incumbent LEC's call-routing network," and that operations support systems do not qualify under that test. GTE Cross-Pet. 21-22. This claim is doubly wrong. First, since operations support systems control the assignment, tracking, maintenance, and repair of call-routing facilities, they are certainly "part of the incumbent LEC's call-routing network." *Id.* Second, and in any event, the statutory definition of network element clearly rejects the notion that only "call-routing" facilities count as network elements, for it encompasses all facilities used "in the transmission, routing, *or other* provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added).

Finally, GTE attempts to create the impression that operations support systems are "aspects of the incumbent's business" that are somehow separate from the network, and that granting a new entrant access to a LEC's operations support systems enables it to obtain "all [its] inputs" from the LEC and thus "to appropriate for its own use all of the aspects of the incumbent's business." GTE Cross-Pet. 21-23. This is a fundamentally inaccurate presentation of the issue. These are not software systems used to track marketing performance, or administer pension benefits, or maintain personnel records. They are the systems used to order and repair the very facilities and services to which the incumbent LEC is required to grant access. And nothing in the FCC's *First Report and Order* relieves new entrants of the need to build their own internal sys-

tems to serve their customers. The only issue is whether those systems and the LECs' systems will be able to converse efficiently when the new entrants need information that resides exclusively in LEC databases, and when the new entrants need to place orders or issue other instructions to the LECs.

2. *Operator services and directory assistance facilities.* As the Eighth Circuit found, the facilities used to provide operator services and directory assistance are likewise "network elements" under Section 153(29), for they too are "equipment used in the provision of a telecommunications service." Indeed, they are part of the very "call-routing network" that GTE erroneously contends is the sole repository of "network elements," for these facilities are used to route calls at customers' request.

GTE focuses on the fact that, in some instances (a decreasing number as automation increases), these facilities will connect a caller to "live operators" who will use the facilities to route calls. GTE contends that "[i]t should be obvious . . . that operators are not a 'facility' or 'equipment.'" GTE Cross-Pet. 24. But all network elements require live persons to operate them. That does not deprive them of their status as network elements.

Finally, GTE contends (GTE Cross-Pet. 24) that these facilities are a "service" and should be made available only through resale. The Eighth Circuit was surely correct, however, in upholding as reasonable the FCC's conclusion that the fact that a functionality can be labeled a "service" does not mean that it is exempt from the requirement that it be made available as a network element, for under such a holding incumbent LECs' could "entirely evade the unbundling requirement in section 251(c)(3)" by choosing to market network elements as "services" to end users. *First Report and Order*, ¶ 263 (see AT&T Resp. to Regional Bell Cos. Cross-Pet. App. 10a); Pet. App. 44a-45a.

3. *Section 251(d)(2).* Finally, GTE's claim on Section 251(d)(2) is likewise neither certworthy nor meritorious. Section 251(d)(2) provides:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—
>
> > (A) access to such network elements as are proprietary in nature is necessary; and
> >
> > (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2).

Contrary to GTE's misstatement (GTE Cross-Pet. 6), these are not "limitations" on what may be declared to be a network element. Section 251(d)(2) is a non-exhaustive list of factors that the Commission must "at a minimum," "consider." They are not controlling, and thus their interpretation is not a certworthy matter. See *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (when "statute by its terms merely requires the Commission to consider" specific factors, "[t]hat means only that it must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight to it' ") (citation omitted).

Moreover, the FCC's interpretation was plainly reasonable. As the Eighth Circuit found, "[a]llowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually." Pet. App. 48a. The economic barriers that enabled LECs to maintain their monopolies arose not because duplication is physically

impossible, but rather because no new entrant has the traffic volumes that would enable it economically to duplicate the essential facilities that the LEC controls. If a new entrant can obtain functionalities more efficiently from sources other than the LEC, obviously it will do so. But where the LEC continues to have cost advantages over other potential sources, the Act requires that it share those economies with others.

CONCLUSION

The undersigned petitioners do not oppose GTE's cross-petition on Question 1. Certiorari on Question 2 and Question 3, however, should be denied.

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